Hj Raimi bin Abdullah v Siti Hasnah Vangarama bt Abdullah and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01(I)-8–04 OF 2013(P) AND 01(I)-9–04 OF 2013(P)
ARIFIN ZAKARIA CHIEF JUSTICE, ZULKEFLI CJ (MALAYA), ABDULL HAMID EMBONG, SURIYADI AND HASAN LAH FCJJ
20 MARCH 2014

Constitutional Law — Jurisdiction — Civil court — Application to convert out of Islam — Validity of conversion — Whether person Muslim or not — Whether religious issue — Whether within jurisdiction of Shariah Court — Whether civil court lacked jurisdiction pursuant to art 121(1A) of the Federal Constitution

The respondent's ('the plaintiff') father had converted to Islam together with his wife and five children, including the plaintiff, who was then one year and three months old in 1983. The plaintiff's parents then affirmed a statutory declaration and the conversion was registered with Majlis Agama Islam dan Adat Resam Melayu Pahang. A certificate of conversion was subsequently issued to the plaintiff's parents but the plaintiff and her siblings' certificates were never issued until 1989. In 2009, the plaintiff commenced an action against the defendants in the High Court, inter alia, for the declarations and orders that the defendants had wrongfully and unlawfully subjected the plaintiff to undergo a religious conversion process at the age of seven years old; the Sijil Akuan Masuk Islam dated 28 December 1989 executed by the plaintiff was ineffective, null and void ab initio; and that the Director General of the National Registration Department be ordered and directed to immediately take all the necessary actions to rectify its record pertaining to the plaintiff, by reinstating the plaintiff's original Indian name in the plaintiff's identity card and to delete the word 'Islam'. The defendants filed separate applications to strike out the plaintiff's originating summons. The High Court allowed the defendants' applications and the plaintiff's action was struck out. On appeal, the only issue raised for the determination by the Court of Appeal was whether or not the subject matter of the plaintiff's action fell within the exclusive jurisdiction of the Penang Shariah High Court. The Court of Appeal, in allowing the plaintiff's appeal, ordered the plaintiff's originating summons be converted to a writ and directed the matter be reverted to the High Court to be tried. The Court of Appeal held that the legal burden was on the defendants to satisfy the court that the subject matter of the action was such that it fell exclusively within the jurisdiction of the Shariah High Court of Penang since it was the defendants who were making the striking out applications and that the defendants had not discharged the legal burden. The issues that arose for the court's determination in this appeal were whether the civil or Shariah Court

had the jurisdiction to determine whether a person professed Islam or not; and what were the matters that fall within the jurisdiction of the Shariah Court.

Held, allowing the appeals with costs; setting aside the orders of Court of Appeal:

(1) Article 121 of the Federal Constitution ('the Constitution') clearly provided that the civil court shall have no jurisdiction on any matter falling within the jurisdiction of the Shariah Court. The matters that fall within the jurisdiction of the Shariah Court were as provided under art 74 of the Constitution, inter alia, matters falling within the State List in the Ninth Schedule which were Islamic law, personal and family law of person professing the religion of Islam. Whether a person was a Muslim or not was a matter falling under the exclusive jurisdiction of the Shariah Court. It would be highly inappropriate for the civil court, which lacks jurisdiction pursuant to art 121, to determine the validity of the conversion of any person to the religion of Islam as this is strictly a religious issue. Therefore, the question of the plaintiff's conversion in 1983 fell within the exclusive jurisdiction of the Shariah Court (see paras 16–18, 27 & 30).

(2) The plaintiff's parents converted to Islam in 1983 together with the plaintiff and her siblings and this was supported by the statutory declaration of the late father. The religion of a minor was determined by the parent or guardian as found in the provisions of art 12(3) and (4) of the Constitution read together with provisions of the Guardianship of Infants Act 1961. Therefore, the father had the right in 1983 to determine the religion of the plaintiff as she was then minor, aged one year and three months (see paras 22–23).

(3) Although the learned High Court judge had rightly struck out the plaintiff's application, the judge had erred in holding that the plaintiff was already a Muslim in 1989 because of the conversion which was alleged to have taken place in 1983. The matter of conversion of the plaintiff together with her father in 1983 ought to be determined first by the Shariah Court before the issue of the alleged conversion in 1989 could be appropriately determined by the civil court. Therefore, the High Court judge had pre-judged the issue of the plaintiff's conversion when it was not for the judge to determine the validity of the conversion in 1983 (see paras 31–32).

[Bahasa Malaysia summary

Bapa responden ('plaintif') telah menukar agama Islam bersama isteri dan lima orang anaknya, termasuk plaintif, yang mana pada masa itu berumur setahun dan tiga bulan pada 1983. Ibu bapa plaintif kemudian mengesahkan deklarasi statutori dan penukaran agama itu telah didaftarkan dengan Majlis Agama

Islam dan Adat Resam Melayu Pahang. Sijil penukaran agama itu kemudian dikeluarkan kepada ibu bapa plaintif tetapi sijil-sijil plaintif dan adik-beradiknya tidak pernah dikeluarkan sehingga 1989. Pada 2009, plaintif telah memulakan tindakan terhadap defendan-defendan di Mahkamah Tinggi, antara alia, untuk deklarasi dan perintah bahawa defendan-defendan dengan salah dan menyalahi undang-undang telah menyebabkan plaintif melalui proses penukaran agama pada umur tujuh tahun; Sijil Akuan Masuk Islam bertarikh 28 Disember 1989 yang disempurnakan oleh plaintif tidak berkuat kuasa, terbatal dan tidak sah ab initio; dan bahawa Ketua Pengarah Jabatan Pendaftaran Negara diperintah dan diarahkan untuk mengambil tindakan segera untuk membetulkan rekosnya berkaitan plaintif, dengan menukar kembali nama India plaintif yang asal dalam kad pengenalan plaintif dan untuk memotong perkataan 'Islam'. Defendan-defendan telah memfailkan permohonan-permohonan berasingan untuk membatalkan saman pemula plaintif. Mahkamah Tinggi membenarkan permohonan-permohonan defendan-defendan dan tindakan plaintif dibatalkan. Semasa rayuan, satu-satu isu yang ditimbulkan untuk penentuan Mahkamah Rayuan adalah sama ada atau tidak hal perkara berhubung tindakan plaintif terangkum dalam bidang kuasa eksklusif Mahkamah Tinggi Syariah Pulau Pinang. Mahkamah Rayuan, dalam membenarkan rayuan plaintif telah memerintahkan sama pemula plaintif ditukar kepada writ dan mengarahkan perkara itu dikembalikan kepada Mahkamah Tinggi untuk dibicarakan. Mahkamah Rayuan memutuskan bahawa beban perundangan terletak atas defendan-defendan yang membuat permohonan-permohonan pembatalan itu dan bahawa defendan-defendan tidak terlepas daripada beban perundangan itu. Isu-isu yang timbul untuk penentuan mahkamah dalam rayuan ini adalah sama ada Mahkamah Syariah atau sivil mempunyai bidang kuasa untuk menentukan sama ada seseorang itu menganut agama Islam atau tidak; dan apakah perkara-perkara yang terangkum di bawah bidang kuasa Mahkamah Syariah.

Diputuskan, membenarkan rayuan-rayuan dengan kos; mengetepikan perintah-perintah Mahkamah Rayuan:

(1) Perkara 121 Perlembagaan Persekutuan ('Perlembagaan') jelas memperuntukkan bahawa mahkamah sivil tidak patut mempunyai apa-apa bidang kuasa berhubung apa-apa perkara yang terangkum dalam bidang kuasa Mahkamah Syariah. Perkara-perkara yang terangkum dalam bidang kuasa Mahkamah Syariah diperuntukkan di bawah perkara 74 Perlembagaan, antara lain, perkara-perkara yang terangkum dalam Senarai Negeri kepada Jadual Kesembilan iaitu undang-undang Islam, undang-undang peribadi dan keluarga berhubung mereka yang menganut agama Islam. Sama ada seorang itu seorang Muslim atau tidak adalah suatu perkara yang terangkum di bawah bidang kuasa eksklusif Mahkamah Syariah. Adalah amat tidak waja untuk mahkamah sivil, yang

tiada bidang kuasa menurut perkara 121, untuk menentukan kesahan penukaran mana-mana orang kepada agama Islam kerana ini adalah isu agama sepenuhnya. Oleh demikian, persoalan berhubung penukaran agama plaintif dalam tahun 1983 terangkum dalam bidang kuasa eksklusif Mahkamah Syariah (lihat perenggan 16–18, 27 & 30).

(2) Ibu bapa plaintif telah bertukar agama Islam dalam tahun 1983 bersama plaintif dan adik-beradiknya dan ini disokong oleh deklarasi statutori mendiang bapa mereka. Agama seorang di bawah umur ditentukan oleh ibu bapa atau penjaga sebagaimana didapati dalam peruntukan perkara 12(3) dan (4) Perlembagaan dibaca bersama peruntukan-peruntukan Akta Hak Penjagaan Bayi 1961. Oeh itu, bapa tersebut mempunyai hak dalam tahuan 1983 untuk menentukan agama plaintif kerana dia seorang di bawah umur pada masa itu, yang berumur setahun dan tiga bulan (lihat perenggan 22–23).

(3) Walaupun hakim Mahkamah Tinggi yang bijaksana telah membatalkan permohonan plaintif sewajarnya, hakim telah terkhilaf memutuskan bahawa plaintif telah pun menjadi seorang Muslim pada tahun 1989 kerana penukaran yang dikatakan telah pun berlaku pada tahun 1983. Perkara berhubung penukaran agama plaintif bersama bapanya pada tahun 1983 patut ditentukan terlebih dahulu oleh Mahkamah Syariah sebelum isu penukaran agama yang dikatakan pada tahun 1989 boleh ditentukan sewajarnya oleh mahkamah sivil. Oleh itu, hakim Mahkamah Tinggi telah memutuskan sebelumnya isu penukaran agama plaintif walhal ia bukan hakim untuk menentukan keesahan penukaran agama pada tahun 1983 (lihat perenggan 31–32).]

Notes

For cases on civil court, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2691–2696.

Cases referred to

James v Government of Malaysia [2012] 1 MLJ 721, HC (refd)

Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain [2007] 4 MLJ 585, FC (refd)

Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 1 MLJ 489; [1999] 2 CLJ 5, FC (folld)

Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia [1999] 1 MLJ 266; [1999] 1 CLJ 483, CA (refd)

Teoh Eng Huat v Kadhi, Pasir Mas & Anor [1990] 2 MLJ 300; [1990] 1 CLJ (Rep) 277, SC (folld)

Legislation referred to

Federal Constitution arts 12(3), (4), 74, 121(1A), Ninth Schedule, State List
Guardianship of Infants Act 1961

A Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c), (d)

Appeal from: Civil Appeal No P01 [1M]-606 of 2012 (Court of Appeal, Putrajaya)

B *Tuan Zubaidah bt Tuan Muda (Zati Farahiyah bt A Halim with him) (Nik Saghir & Ismail) in Civil Appeal No 01–8–04 of 2013(P) for the appellant.*
Jannu Babjan (Noor Asyimah Ramli and Siti Azizah Mulian with him) (Noor Asyimah & Advocates & Solicitors) in Civil Appeal No 01–9–04 of 2013(P) for the appellant.
Gooi Hock Seng (Gooi & Associates) in Civil Appeal No 01–8–04 of 2013(P) for the respondent.
C *Gooi Hock Seng (Gooi & Associates) in Civil Appeal No 01–9–04 of 2013(P) for the respondent.*

Arifin Zakaria Chief Justice (delivering judgment of the court):

D

INTRODUCTION

E **[1]** There are two appeals before us namely, Civil Appeal No 01(I)-8–04 of 2013(P) and Civil Appeal No 01(I)-9–04 of 2013(P) against the decision of the Court of Appeal dated 12 January 2012 which allowed the respondent's appeal against the decision of the High Court dated 4 August 2010. This court had on 25 March 2013 granted the appellants leave to appeal on the following
F questions of law:

(a) whether the civil or the Shariah Court has the jurisdiction to determine whether a person professes Islam or not; and

(b) whether the civil court has the jurisdiction to determine the validity of
G the conversion to Islam of a minor.

[2] In this judgment, the appellant in Civil Appeal No 01(I)-8–04 of 2013(P) will be referred to as the second defendant, with the appellant in Civil Appeal No 01(i)-9–04 of 2013(P) as the third defendant and the respondent as
H the plaintiff, as they were in the High Court.

THE FACTS

[3] The plaintiff was born on 13August 1982. On 30 November 1983, the
I plaintiff's father, Subramaniam a/l Bangaraih converted to Islam (carrying the Muslim name, Mohd Yusof bin Abdullah) together with his wife, Latchumy a/p Ramadu (carrying the Muslim name, Siti Aisyah bt Abdullah) and his five children, including the plaintiff. The plaintiff at the material time was one year and three months old.

[4] Pursuant to their conversion to Islam, both the plaintiff's father and mother had affirmed a statutory declaration dated 30 November 1983 respectively declaring that they, without any coercion and on their own free will had embraced the Islamic faith. The statutory declarations read:

(i) Saya SUBRAMANIAM A/L BANGARAIAH K/P. NO: 1930652 dengan sesungguhnya dan sebenarnya mengaku bahawa saya dengan akal fikiran yang sempurna dan badan yang sihat serta tidak dipaksa oleh sesiapa dan dengan rela hati saya sendiri dan bersama dengan lima orang anak saya 3 lelaki dan 2 perempuan, memeluk Ugama Islam.

(ii) Saya LATCHUMI A/P. RAMADU K/P. NO: 7664539 dengan sesungguhnya dan sebenarnya mengaku bahawa saya dengan akal fikiran yang sempurna dan badan yang sehat serta tidak dipaksa oleh sesiapa dan dengan rela hati saya sendiri memeluk Ugama Islam.

[5] The conversion to Islam of the plaintiff's parents was registered with Majlis Agama Islam and Adat Resam Melayu Pahang on 13 January 1984. Certificates of conversion dated 13 January 1984 were then issued to both the plaintiff's parents.

[6] For registration purposes, Majlis Agama Islam dan Adat Resam Melayu Pahang had duly registered the said conversion by registering the conversion in their book of register. As part of the registration of conversion process, particulars and photographs of both the plaintiff's parents and the plaintiff, taken together with her siblings, were attached to the book of registration. However, the certificate of conversion to Islam in respect of the plaintiff and her siblings was never issued.

[7] The plaintiff's mother passed away on 25 December 1989 while the plaintiff's father passed away in 2004.

[8] In a report prepared by the third defendant, it was stated, inter alia, as follows:

(a) the whole family had moved from Rompin, Pahang to Penang.

(b) in 1989, the family were in dire strait whereby the plaintiff and the two siblings were then sent to the Ramakrishna Orphanage in Penang with the help of an Indian man. The orphanage is also known as SRJK(T) Ramakrishna, Jalan Scotland 10450, Penang.

(c) the plaintiff's mother passed away on 25 December 1989.

(d) on 28 December 1989, the plaintiff and her siblings were then issued with a certificate of conversion to Islam by Kadi Bandaraya Pulau Pinang.

(e) the plaintiff's mother informed Puan Shabariah bt Abu Bakar of the

admission of the plaintiff and her siblings to the Ramakrishna Orphanage. Puan Shabariah bt Abu Bakar then informed Ustaz Muhamad Abdul Karim, Head of the Ukhwah Division, Jabatan Agama Islam Pulau Pinang. At the material time, the Director of Jabatan Agama Islam Pulau Pinang, one Tuan Hj Mohd Yusoff bin Rejab directed a group of enforcement officers to take the plaintiff and her siblings out of the Ramakrishna Orphanage on the basis that they were Muslims.

(f) the plaintiff and her siblings were accordingly taken out from the Ramakrishna Orphanage. They were then put under the care and protection of Tuan Hj Raimi bin Abdullah (the second defendant) and placed at Sekolah Agama Masriyah, Bukit Mertajam, Pulau Pinang

(g) the plaintiff then ran away from the above mentioned institution and returned to Tuan Hj Raimi bin Abdullah.

(h) aggrieved with the plaintiff's intolerable conduct, Tuan Hj Raimi handed over the custody of the plaintiff to Puan Shabariah bt Abu Bakar.

(i) on 5 March 1990, the plaintiff was sent to Rumah Kanak-Kanak Taman Bakti Kepala Batas Seberang Perai, Pulau Pinang.

(j) on 6 March 1990, the plaintiff was again sent to Tuan Hj Raimi bin Abdullah for custody.

(k) on the application for care and protection by the Social Welfare Officer, the Juvenile Court of Sungai Petani had on 3 April 1991 ordered the plaintiff be placed under the custody of Rumah Kanak-Kanak Taman Bakti Kepala Batas Seberang Perai, Pulau Pinang until she attained the age of 18.

(l) on 8 August 1998, the plaintiff ran away from Rumah Kanak-Kanak Taman Bakti Kepala Batas Seberang Perai.

PROCEEDINGS IN THE HIGH COURT

[9] The plaintiff had on 23 December 2009 instituted an action against the defendants in the High Court of Pulau Pinang. In her originating summons, the plaintiff sought, inter alia, the following declarations and orders:

(a) the defendants had wrongfully and unlawfully subject the plaintiff to undergo a religious conversion process at the age of seven years old on 28 December 1989;

(b) the *Sijil Akuan Masuk Islam* dated 28 December 1989 executed by the plaintiff was ineffective, null and void ab initio; and

(c) the Director General of the National Registration Department be

ordered and directed to immediately take all necessary actions to rectify (and amend, if necessary) its record pertaining to the plaintiff, by reinstating the plaintiff's original Indian name, Vangarama a/p Subramaniam in the plaintiff's identity card and to delete the word 'Islam' from the same.

Alleged unconstitutional conversion on 28 December 1989

[10] To better understand the alleged facts, it is necessary for us to refer to the relevant portions of the plaintiff's affidavit. It reads:

AFFIDAVIT IN SUPPORT

I, Siti Hasmah Vangarama bt Abdullah (Nric No. 820813-06-5578) of full age and a Malaysian citizen, residing at No. 50, Jalan Besar, 34250 Tanjung Piandang, Perak, do hereby affirm and say as follows:

(1) I am the above named plaintiff and the facts deposed herein are true to the best of my personal knowledge and from the records in my possession unless stated otherwise.

(2) I am 26 years of age and I was born on the 13th day of August 1982. A copy of my NRIC Card is now produced and shown to me marked as exhibit 'BAS-1'.

(3) I am an Indian by race, and a Hindu by birth. I say that the original Hindu birth name given to me by my parents is Banggarma a/p Subramaniam.

(4) A copy of my birth certificate is now produced and shown to me marked as exhibit 'BAS-2'.

(5) I say that when I was seven years of age, on the 28th day of December 1989, I was taken by the second defendant, Tuan Haji Raimi bin Abdullah, an official of first defendant's society, PERKIM, and other muballigh officials from the third defendant to the kadi Bandaraya ofPenang to be converted into a Muslim.

(6) I say that at the material time, in presence of the aforesaid Tuan Haji Raimi bin Abdullah and other Penang Islamic Council Muballigh officers, I was instructed by the kadi bandaraya to take the affirmation of faith 'Kalimah Shahadat', by uttering and reciting the following words:-

(a) That I, Bangarama a/p Subramaniam, Nric. No C179583, born on 13 August 1982 and staying in Kepala Batas, SPU, the owner of the above picture, on this day, joyously before you, informs you that I now verily have faith that the religion of Islam is the best religion. Therefore, I hereby joyously say that from this moment I have renounced the Hindu religion which I have embraced before and on my own free will I have chosen the sacred holy Islam religion as my religion.

(b) Now to confirm that I have become a Muslim without being forced by anyone I hereby affirm by uttering two Kalimah Shahadat: Verily, I bear witness that the Prophet Muhammad S.A.W is the messenger of Allah.

(c) I hereby admit that everything I have said above is all true and I have chosen a Muslim name.

(7) I say that immediately upon taking the aforesaid oath of affirmation of faith on the 26th day of December 1989, I was asked by the kadi Bandaraya to execute the Certificate of the Declaration to Convert into Islam 'Sijil Akuan Masuk Islam'. A copy of the aforesaid certificate of Declaration to Convert into Islam dated 28th day of December 1989 is now produced and shown to be marked as exhibit 'BAS-3'.

(8) I say that at the material time, I did not and could not have understood the contents and meaning of the words in the said Certificate of Declaration to Convert into Islam dated 28th day of December 1989 of which I was asked to recite, utter and execute.

(9) I further say and stress that as a child, merely seven years of age, I did not have any choice except to obey the directions given by the defendants to take the affirmation of oath.

(10) I say that up until recently, I was ignorant of that fact that my purported conversion process into Islam by the defendants when I was seven years old was defective and bad in law, and that I could legally challenge the same until after having consulted and being advised by my present solicitor.

(11) I am advised by my solicitor and verily believe that the first defendant's society, PERKIM, the second defendant, the third defendant and fourth defendant had, jointly and severally acted wrongfully and unlawfully by instructing me to recite the Kalimah Shahadat and to give my consent to convert into Islam on 28.12.1989 when I was seven years old.

(12) Based on the aforesaid, I pray for an order in terms of my originating Summons filed together herein, …

[11] The defendants had on 12 February 2010 filed separate applications pursuant to O 18 r 19(1) limbs (a) to (d) of the Rules of the High Court 1980 ('the RHC') to strike out the plaintiff's originating summons.

[12] On 4 August 2010, the High Court allowed the defendants' applications and the plaintiff's originating summons was accordingly struck out with costs. In allowing the defendants' applications, Yaacob Md Sam J held as follows:

[51] Mahkamah juga bersetuju dengan hujahan yang bijaksana peguam kanan persekutuan bagi pihak defendan keempat bahawa tindakan bapa dan ibu plaintif membawa bersama anak-anaknya dibawah umurl apan belas tahun bagi masuk ke

agama Islam adalah teratur dan dibolehkan di bawah seksyen 101 Enakmen Pentadbiran Ugama Islam Dan AdatResam Melayu Pahang 1982 (Enakmen 8 Tahun 1982). Enakmen ini adalah statut yang berkuatkuasa semasa bapa dan ibu plaintif memeluk Islam pada 30.11.1983.

…

[53] Dengan yang demikian mahkamah berpendapat Sijil Akuan berkanun yang dibuat oleh bapa plaintif pada ketika memeluk Agama Islam pada 30.11.1983 bahawa beliau bersama semua anak-anaknya memasuki dan memeluk agama Islam adalah selari dengan seksyen 101 Enakmen Pentadbiran Ugama Islam dan Adat Resam Melayu Pahang 1982. Penentuan agama bagi anak-anak di bawah umur minor oleh ibu bapa plaintif juga tidak melanggar prinsip undang-undang yang diputuskan dalam kes *Teoh Eng Huat v Kadhi, Pasir Mas & Anor* [1990] 2 CLJ 11.

…

[57] Di atas huraian yang telah mahkamah ini butirkan di atas, mahkamah ini berpendapat dari keterangan-keterangan yang terdapat, plaintif adalah seorang yang beragama Islam sejak kedua ibu bapa plaintif menganut agama Islam bersama-sama adik beradik plaintif serta plaintif sendiri dan plaintif masih kekal dalam agama Islam pada 28.12.1989 ketika pengeluaran Sijil Akuan Masuk Islam oleh defendan keempat dalam upacara yang dijalankan oleh PERKIM yang defendan Pertama adalah Yang Di Pertua PERKIM pada ketika itu dan defendan Kedua adalah Setiausaha PERKIM ketika itu.

[58] Di atas alasan-alasan oleh mahkamah ini yang disebutkan di atas, mahkamah berpendapat tindakan yang dibawa oleh plaintif bagi mendapatkan deklarasi yang dipohonkan adalah merupakan perkara pokok (subject-matter) yang ekslusif berada di bawah bidangkuasa Mahkamah Syariah untuk memutuskannya dan bukannya di mahkamah ini. Di atas alasan ini sahaja pun tindakan plaintif ini wajar ditolak di atas alasan mahkamah ini tidak mempunyai bidang kuasa bagi mendengar dan memberikan perintah yang dipohonkan oleh plaintif tersebut bahawa dia bukan seorang yang beragama Islam.

PROCEEDINGS IN THE COURT OF APPEAL

[13] Aggrieved, the plaintiff on 1 September 2010 appealed to the Court of Appeal. At the commencement of the appeal, parties agreed that the Court of Appeal should decide only on one issue ie 'whether or not the subject matter of the plaintiff's action falls within the exclusive jurisdiction of the Penang Syariah High Court.'

[14] On 12 January 2012, the Court of Appeal unanimously allowed the plaintiff's appeal with costs. The Court of Appeal ordered the plaintiff's originating summons be converted to a writ and directed the matter be reverted to the High Court to be tried. In delivering the judgment of the court, Mohd Hishamudin Yunus (JCA) had this to say:

With respect we are unable to agree with the decision of the learned Judge. We are unable to agree with the view that he expressed that the subject matter of the action is exclusively within the jurisdiction of the Syariah High Court of Penang.

In our judgment, in the present case, since it is the defendants who are making the striking out applications, the legal burden is on the defendants to satisfy the court that the subject matter of the action is such that it comes exclusively within the jurisdiction of the Syariah High Court of Penang.

In our judgment, we do not think that the defendants have discharged that legal burden.

At the outset we wish to stress here that we do not think that it is the law that a subject matter of a claim or complaint automatically ceases to be within the jurisdiction of the civil Courts just because it has an Islamic law element in it. This is not the intention of Article 121(1 A) of the Federal Constitution says. Clause (1A) of Article 121 states —

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

In our view, the correct position in law is that only if the subject matter of the action is exclusively within the jurisdiction of the Syariah Courts would the subject matter, by virtue of Article 121(1 A) of the Federal Constitution, fall outside the jurisdiction of the civil Courts.

PROCEEDINGS IN THE FEDERAL COURT

[15] The first question posed to us is whether the civil or the Shariah Court has the jurisdiction to determine whether a person professes Islam or not.

[16] The answer to the above question is governed by the provision of art 121(1A) of the Federal Constitution. For convenience, we set out below the said provision:

Judicial power of the Federation

121(1) there shall be two High Courts of co-ordinate jurisdiction and status, namely —

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States ofSabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed),

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The court referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Court.

[17] From the above provision, it is clear that the civil court shall have no jurisdiction on any matter falling within the jurisdiction of the Shariah Court. The next question is, what then are the matters that fall within the jurisdiction of the Shariah Court? This is to be found in the provision of art 74 of the Federal Constitution, and the relevant part reads as follows:

Subject matter of federal and State laws

74(1) without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

[18] Among the matters falling within the State List in the Ninth ScheduleState List in the Ninth Schedule are Islamic law, personal and family law of person professing the religion of Islam.

[19] The ambit of the jurisdiction of the Shariah Court was considered at length in the case of *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489; [1999] 2 CLJ 5, where Mohd Dzaiddin FCJ, in delivering the judgment of this court stated:

It cannot be disputed that the Syariah court derives its jurisdiction under a State law enacted pursuant to art 74(2) of the Constitution following para 1, State List of the Ninth Schedule of the Constitution and in the case of the Federal Territories by virtue of item 6(e) Federal List. *Thus, on a matter relating to conversion to Islam, all State Enactments and the Act expressly vest the Syariah Court jurisdiction to deal with the matter*. See, for example, ss 139, 140, 141 of the Kedah Enactment; Part IX (ss 85–95) of the Administration of Islamic Law (Federal Territories) Act 1993; and Part VIII (ss 77–89) the Penang Administration of Muslim Law Enactment 1993. The sections referred to deal with capacity, requirements of a valid conversion, registration, certificate of conversion and recognition of a convert as a Muslim. It is interesting to note that s 87 of the Federal Territories Act provides that from the moment of his conversion, a convert becomes subject to the same duties and obligation as any other Muslim.

…

> One reason we can think of is that the determination of a Muslim convert's conversion out of Islam involves inquiring into the validity of his purported renunciation of Islam under Islamic law in accordance with Hukum Syarak (*Dalip Kaur*). *As in the case of conversion to Islam, certain requirements must be complied with under Hukum Syarak for a conversion out of Islam to be valid, which only the Svariah courts are the experts and appropriate to adjudicate. In short, it does seem inevitable that since matters on conversion to Islam come under the jurisdiction of the Syariah courts, by implication conversion out of Islam should also fall under the jurisdiction of the same courts.* (Emphasis added.)

[20] We are not unmindful of the decision of the Court of Appeal in *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia* [1999] 1 MLJ 266; [1999] 1 CLJ 483 where the Court of Appeal held as follows:

> Article 121(1A) of the FC does not exclude the jurisdiction of the ordinary courts over all matters — including offences under the PC committed by Muslims — which are also within the jurisdiction of the Syariah Court. It only removes the jurisdiction of the ordinary courts over those matters which are within the exclusive jurisdiction of the Syariah Court. The intention of the Legislature, as could be discerned from Hansard, was to prevent the High Court from exercising judicial review over the decisions of the Syariah Court.

[21] Thus, in *James v Government of Malaysia* [2012] 1 MLJ 721 and *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585, it was held that apostasy was a matter within the exclusive jurisdiction of the Shariah Court.

[22] Premised on the above authorities, it is settled law that the question of whether a person is a Muslim or not is a matter falling under the exclusive jurisdiction of the Shariah Court. On the facts in the present case, it is not in dispute that the plaintiff's parents converted to Islam in 1983 together with the plaintiff and her siblings. This is supported by the statutory declaration of the late father referred to earlier.

[23] Under the law, the religion of a minor is determined by the parent or guardian. This is found in the provisions of art 12(3) and (4) of the Federal Constitution read together with provisions of the Guardianship of Infants Act 1961. Thus, the father in the present case, had the right in 1983 to determine the religion of the plaintiff as she was then a minor, aged one year and three months. It was contended on behalf of the defendants that what transpired in 1983 was lawful and valid and that the plaintiff had been converted to Islam together with the father. This is a matter within the right of the father. Such a view is supported by the decision of this court in *Teoh Eng Huat v Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300; [1990] 1 CLJ (Rep) 277.

[24] In *Teoh Eng Huat*, the plaintiff's daughter, a minor was converted to Islam. The plaintiff sought a declaration, at the Kota Bharu High Court, that he, as the lawful father and guardian, had the right to decide on her religion, education and upbringing. The Kota Bharu High Court dismissed the application. The plaintiff then appealed against that decision. In delivering the judgment of the Supreme Court, Abdul Hamid Omar LP held as follows:

> We are also mindful of Article 3 of the Constitution which says that Islam is the religion of the Federation: but other religions shall be practised in peace and harmony in any part of the federation.
>
> An affirmation of Article 3 of the Constitution was specifically stated in para 15 of the Malaysian Report of the Inter-Governmental Committee 1962. There was a similar affirmation of Article 11 of the Constitution (para 15(2)).
>
> Stripped of technical hairsplitting or purely academic arguments, it is our view that under normal circumstances, a parent or guardian (non-Muslim) has the right to decide the choice of various issues affecting an infant's life until he reaches the age of majority. Our view is fortified by the provisions of the Guardianship of Infants Act 1961, which incorporates the rights, and liabilities of infants and regulates the relationship between infants and parents. We do not find favour with the learned Judge's view that the rights relating to religion is not covered by the Act on ground that the word 'religion' is not clearly spelt out in the law. In our view religious practice is one of the rights of the infant, exercised by the guardian on his behalf until he becomes a major. In India Article 28(3)2 of the Indian Constitution states:
>
> > No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.
>
> This section makes it incumbent to obtain consent of guardians.
>
> In all circumstances we are of the view that in the wider interests of the nation, no infant shall have the automatic right to receive instructions relating to any other religion than his own without the permission of the parent or guardian.
>
> Reverting to the issue before this Court, the crucial question remains whether the subject, an infant at the time of conversion, had legal capacity according to law applicable to her. It is our considered view that the law applicable to her immediately prior to her conversion is civil law. We do not agree with the learned Judge's decision that the subject although below 18 had capacity to choose her own religion. As the law applicable to the infant at the time of conversion is the civil law, the right of religious practice of the infant shall therefore be exercised by the guardian on her behalf until she becomes a major. *In short, we hold that a person under 18 does not have that right and in the case of non-Muslims the parent or guardian normally have the choice of the minor's religion*.
>
> We would observe that the appellant would have been entitled to the declaration he had asked for. However, we decline to make such declaration as the subject is no longer an infant. (Emphasis added.)

[25] The first issue that this court needs to ask in the present case is what was the religion of the plaintiff on the date when she alleged that she had been 'wrongfully and unlawfully subjected to undergo a religious conversion process' to Islam in 1989. In our view, in determining this issue, it is necessary to first consider whether her conversion to Islam by her late father in 1983 was lawful, valid and effective. This raises the question of which court, is it the Shariah Court or the civil court shall have the jurisdiction to determine this issue.

[26] Learned counsel for the defendants contended that this issue ought to be determined by the Shariah Court as it relates to the conversion of the plaintiff to Islam.

[27] We are inclined to agree with the defendants as it would be highly inappropriate for the civil court to determine the validity of the conversion of any person to the religion of Islam as this is strictly a religious issue. As such the civil court shall have no jurisdiction by reason of art 121(1A). This view found support in the case of *Soon Singh a/l Bikar Singh*.

[28] The Court of Appeal in the present case in arriving at its decision held that the plaintiff was never a Muslim and for that reason the conversion of the plaintiff in 1989 by the defendants was unlawful. In the judgment of the Court of Appeal delivered by Mohd Hishamudin Yunus (JCA), it stated:

> In our judgment, from the nature of the declaration sought, and the averments in her supporting affidavit, clearly, the plaintiff is not claiming to be a Muslim; neither is she renouncing the Islamic faith. It is not a case of the plaintiff claiming being a Muslim and now wanting to renounce her Islamic faith. On the contrary, what the plaintiff is contending is that she was never a Muslim in the first place. S*he was a Hindu by birth but had been made, in an unconstitutional and unlawful manner, to renounce her Hindu faith and to embrace Islam on 28 December 1989 by the wrongful actions of the defendants*. It is her contention that the 'conversion' was unlawful and unconstitutional, and, therefore, invalid; as she was at that point of time a Hindu, a minor, and there was no parental consent for the conversion; and being of seven years of age she did not understand what the conversion process was all about. It is her contention that the alleged conversion to Islam was contrary to section 117 of the Administration of the Religion of Islam (State of Penang) Enactment 2004; contrary to section 5(1) of the Guardianship of Infants Act 1961; and there have been violations of her constitutional rights under Article 11 (1) and Article 12(4) of the Federal Constitution. (Emphasis added.)

[29] It would appear that the Court of Appeal arrived at its decision on the premise that the plaintiff was of the Hindu faith and had never embraced Islam prior to 1989. The Court of Appeal therefore completely ignored the fact that

the plaintiff had been converted to Islam together with her father in 1983, a fact which had never been challenged by the plaintiff.

[30] We are of the considered view that the plaintiff's application in the present case could not be decided without first determining the validity of the conversion of the plaintiff in 1983. In our view, this is a matter that falls squarely within the exclusive jurisdiction of the Shariah Court.

[31] In the present case, the learned High Court judge had struck out the plaintiff's application on the ground that in 1989 the plaintiff was already a Muslim by virtue of the conversion in 1983. However, we are of the view that it is not for the learned judge to determine the validity of the conversion in 1983. The learned High Court judge in the present case thus had prejudged the issue of the plaintiff's conversion in 1983. We hold that the matter of conversion of the plaintiff together with her father in 1983 ought to be determined first by the Shariah Court, then only the issue of the alleged conversion in 1989 could appropriately be determined by the civil court. Hence, it is premature for the civil court to entertain the plaintiff's application at this stage.

[32] In the circumstances, we hold that the application of the plaintiff was rightly struck out by the learned judge. However, we are of the view that the learned judge erred in holding that the plaintiff was already a Muslim in 1989 because of the conversion which was alleged to have taken place in 1983. We say so as we hold that it is not for the learned judge of the civil court to make such a finding. We are of the view that the issue as regards the validity of the plaintiff's conversion in 1983 is a matter strictly within the exclusive jurisdiction of the Shariah Court.

CONCLUSION

[33] It follows therefore, that our answer to the first question would be that the Shariah Court shall have the exclusive jurisdiction to determine whether a person is a Muslim or not. As regards the second question, we are of the view that this will depend on the facts of a given case. In the present case, for reasons adumbrated earlier, the question of the plaintiff's conversion in 1983 falls within the exclusive jurisdiction of the Shariah Court.

A **[34]** In the result, the appeals are allowed with costs. The orders of the Court of Appeal are accordingly set aside.

Appeals allowed with costs; orders of Court of Appeal set aside.

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Reported by Afiq Mohamad Noor

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